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No. 795

In the Supreme Court of the United States

OCTOBER TERM, 1957

HERMAN ROBERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals is reported at 249 F. 2d 737.

JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1957. A petition for rehearing and motion to supplement the record was denied on January 25, 1958. The petition for a writ of certiorari was filed on February 19, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a new trial should have been granted on petitioner's showing, after trial, that the presiding

judge had been United States Attorney in another district when the principal Government witness pleaded guilty to the interstate transportation of a stolen automobile not alleged to be among those involved in the charges against petitioner.

2. Whether the Court of Appeals should have required the Government's confidential file pertaining to the witness to be added to the record in order to pass on the issue of disqualification.

3. Whether petitioner should have been permitted to cross-examine a Government witness concerning alleged past acts of misconduct, for which the witness had been neither indicted nor convicted, when such alleged acts were not related to charges against petitioner.

4. Whether a mistrial should have been declared because petitioner, testifying as a witness in his own behalf, was asked whether or not he had been convicted of "distilling," when the trial judge sustained an objection to the question (which was never answered) and instructed the jury to disregard the question.

STATUTE AND RULE INVOLVED

28 U. S. C., Section 455 provides:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Rule 26, F. R. Crim. P.:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT

In the United States District Court for the Middle District of Alabama, petitioner was convicted on counts 1, 4, and 5 of an indictment charging the receipt and sale of stolen motor vehicles moving in interstate commerce and known to have been stolen. Count 1 charged petitioner alone with having received in March 1953 a stolen 1948 Chevrolet. Counts 4, and 5, against petitioner and one Bill Rhodes, charged the receipt and sale of a 1951 Cadillac in June 1953 (R. 2–3, 325). Petitioner was sentenced generally to imprisonment for four years (R. 336). On appeal, the conviction was unanimously affirmed by the Fifth Circuit (Pet. 19–29).[1]

At the trial, the Government proved its case through the testimony of one Hollis Bryant that he had stolen the automobiles in question, transported them interstate, and sold them to petitioner (R. 49–75). Bryant's testimony was corroborated by Mrs.

[1] A prior conviction on essentially the same charges had been reversed for errors in the questioning of petitioner's character witnesses as to petitioner's prior convictions for transporting liquor. 237 F. 2d 536.

Vernita Philyaw, who was with Bryant when the automobiles were stolen and resold (R. 111–123). The owners of the automobiles testified that the cars were stolen, two of them implicating Bryant in the theft (R. 31–35, 44–49). Bryant sold each of the cars, including the Cadillac, for from $300 to $350 (R. 55–56, 59–60, 66). For the Cadillac, petitioner agreed to give him, as an additional $700, registrations for other automobiles at the rate of $25 a registration (R. 70). An automobile salesman testified as an expert that the wholesale market value of the automobiles at the time of their purchase from Bryant by petitioner was considerably higher than the price petitioner paid (R. 107–110). The purchasers of the Cadillac and Chevrolet testified to buying the cars from petitioner's used car lot (R. 98–103, 128–137).

Petitioner's defense was that the Chevrolet was in reality purchased by Jack Hamel and Hayden McBrayer, who operated an independent used car dealership on his lot, and that his only part in the transaction was to lend them the money to make the purchases (R. 195–199). He further alleged that the Cadillac was in reality purchased by his brother-in-law, Bill Rhodes, with money lent by petitioner's wife, and that he arranged for the resale of the Cadillac by Rhodes merely as a service (R. 155–156, 181, 199–201). Hamel and McBrayer denied his allegations (R. 228-234, 252–258).

As part of his defense, petitioner attempted to show that Hamel and McBrayer had poor reputations in the community for truth and veracity (R. 275–288), and that McBrayer had absconded with floor-planned auto-

mobiles belonging to the McBrayer-Hamel firm shortly after the sales involved in this case. He first asked Hamel on cross-examination if this were not the fact, and Hamel denied it (R. 243). Then, after McBrayer denied to the United States Attorney on direct examination that he had absconded with any money or papers belonging to the firm (R. 258), petitioner attempted to question him on cross-examination concerning the floor-planned automobiles. The court on its own motion disallowed the question, stated that McBrayer was not on trial and the question was neither material nor pertinent to the case, and that neither the Government nor petitioner were to attempt any further examination on this point (R. 258, 259).

Other pertinent facts are set forth below in connection with certain contentions made by petitioner.

ARGUMENT

1. On April 18, 1957, after conviction and sentence, petitioner moved for a new trial, arguing *inter alia* that the trial judge should have recused himself because he was United States Attorney for the Northern District of Alabama when the case against Hollis Bryant was under investigation by that office and when Bryant was sentenced in that district. Petitioner alleged that this fact was not known to him until after the trial had been completed (R. 338–340). The court dismissed the contention as frivolous (R. 346). In affirming the conviction, the Court of Appeals pointed out that there was no showing that the cars involved in petitioner's trial were those involved in the charge against Bryant so that, not only was

there no violation of 28 U. S. C. 455 (*supra*, p. 2), but there was no showing of any prior knowledge or interest which might be ground for disqualification (Pet. App. 23–24).

The presiding judge was clearly not disqualified under 28 U. S. C. 455. Only two of the four grounds set forth in the section could possibly be applicable to this case: that Judge Johnson had "been of counsel," or that he "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial." Judge Johnson was never "of counsel" in any case involving petitioner. Rather, he was of counsel in a case against Hollis Bryant. Petitioner's reliance on *United States* v. *Vasilick*, 160 F. 2d 631 (C. A. 3), and *United States* v. *Maher*, 88 F. Supp. 1007 (D. Me.), is thus misplaced. Each of these cases involved a judge called upon to rule upon a motion to vacate attacking a conviction obtained when the judge was United States Attorney. The ruling in each case was that the United States Attorney was "of counsel" in the case even though his personal participation was limited to signing the indictment. But here the judge was not even technically of counsel in a case against petitioner. There is thus even less basis for recusation here than there was in *Rose* v. *United States*, 295 Fed. 687 (C. A. 4), in which an indictment which was never tried was signed by a United States Attorney who later was appointed judge in the same district. It was held that he was not required to disqualify himself from presiding over the trial of a later indictment

brought against the same defendant and covering some of the same transactions. In other words, together the cases hold that while a judge must recuse himself if he had a direct, even though merely formal, connection with a case before him, the judge need not recuse himself if he has merely had a connection with a collateral case.

Petitioner claims that Judge Johnson had "prior knowledge," and this alone is enough to have required his recusation. No showing of prior knowledge is made. There was no proof that the charge against Bryant related to cars involved in petitioner's trial, a fact which, if true, could have been shown from the official records in Bryant's case. It can hardly be presumed that the judge must have heard about petitioner because, while he was United States Attorney in another district, his office investigated a thief who later sold other cars to petitioner. And even assuming some knowledge, this would not amount to an interest in the case or connection with a party under 28 U. S. C. 455. Moreover, even where this is such a connection, the statute does not require recusation but leaves it to the judge to determine whether "in his opinion" it would not be proper for him to sit.

As for any question of propriety beyond the strict terms of the statute, this even more clearly was for the judge to decide. It is evident from the judge's characterization of petitioner's claim as frivolous that the judge did not in fact have any prior knowledge of petitioner which would lead him to believe that he should recuse himself.

2. In his petition for rehearing in the Court of Appeals, in an effort to establish prior knowledge by the judge, which petitioner assumes (erroneously as shown above) would have required recusation,[2] petitioner moved to have the entire confidential investigative file used by the United States Attorney's office in the Northern District of Alabama in regard to Bryant added to the record of this case for inspection by the Court of Appeals. The petition for rehearing was denied without opinion. Petitioner (Pet. 8–10) seeks review of that action.

No doubt the Court of Appeals has authority to supplement a record if there has been omitted from it matter which is deemed necessary or appropriate, as the court below ruled in a very different context in *Phillips Petroleum Corporation* v. *Williams*, 159 F. 2d 1011.[3] Here, even assuming *arguendo* that petitioner's motion

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[2] No claim is made that the file is necessary to show that the charge against Bryant related to a car involved in petitioner's case. That information could be obtained from the official court records of the United States District Court for the Northern District of Alabama. These records, including Bryant's indictment, which identifies by year, make, and motor number the automobile he was charged with transporting, would disclose that the automobile was not identical with any of the automobiles involved in this case.

[3] That case involved a petition to retax costs, and held that the printed record should be abbreviated whenever and wherever possible. In laying down this holding, the court undertook to lay at rest the fears of litigants that they might leave something out of the record which would later turn out to be vital, by saying at page 1012 that it had "ample authority * * * to supplement the record if there has been omitted from it matter which is deemed necessary or appropriate in the decision of the case."

to supplement the record (not made until the petition for rehearing in the Court of Appeals) was timely, the file was neither necessary nor appropriate. Even if petitioner were mentioned therein, this would not prove that Judge Johnson, rather than some assistant, had read the files, and it would certainly not show that Judge Johnson had any memory of the facts when petitioner's case came before him. See *Rose* v. *United States*, 295 Fed. 687, 688, *supra*. And as discussed above, prior knowledge would not in any event *per se* require recusation.

Petitioner calls upon *Jencks* v. *United States*, 353 U. S. 657, in support of his contention, claiming (Pet. 9) that *Jencks* holds that "an accused is entitled to have government files made a part of the record when such files contain evidence material to his case." But he has badly misread that decision, which dealt entirely with the right of a defendant to inspect, for impeachment purposes, the prior statements of witnesses who testify against him during trial. This Court specifically excluded inspection which was not a demand for "specific documents" or which "propose(d) any broad or blind fishing expedition among documents possessed by the Government on the chance that something * * * might turn up." 353 U. S. 657, 666, 667.

3. Petitioner claims that he was prejudiced in not being permitted to ask McBrayer on cross-examination whether he had left Montgomery with floor-planned, or mortgaged, automobiles (R. 258, 259). This alleged occurrence, which had been denied by

Hamel and by McBrayer himself on direct examination, was after the events involved in petitioner's trial and had nothing to do with the cars involved in the charges against petitioner. It was therefore well within the discretion of the trial judge to bar further questioning with respect thereto.

The rule is that a witness may be impeached only by showing conviction for a felony, and not by showing wrongful conduct or the commission of an offense for which there has been no conviction. *Lennon* v. *United States*, 20 F. 2d 490 (C. A. 8), and cases cited at page 494; *Echert* v. *United States*, 188 F. 2d 336 (C. A. 8). Indeed, petitioner relies on this very rule in connection with an issue he raises as to his own cross-examination (Pet. 14–17).

There are cases which hold that a witness may be cross-examined on matters which have a direct and material bearing on the motivation of a witness to give perjurious testimony concerning the matters at issue in the case. Such is *Tla-koo-yel-lee* v. *United States*, 167 U. S. 274, on which petitioner principally relies. That case involved the alleged murder of a white man by two Indians in the presence of two other Indians, the only purported eye-witnesses, one of whom was the wife of one of the accused. Defendant sought unsuccessfully to ask this woman whether she had agreed with the other witness that she would live with him if her husband was convicted, and whether she was in fact then living with him. The excluded questions had a direct and material bearing on her credibility, as her answer might disclose that she stood

to gain by giving untruthful testimony. See also *Weisflog* v. *United States*, 291 Fed. 339 (C. A. 8).[4]

These decisions are not in point here. McBrayer was not questioned concerning the automobiles involved in this case, but about other automobiles. There is no apparent way that he could have covered up his own misdeeds by giving perjurious testimony against petitioner. And showing that he committed another type of offense would not show that he, rather than petitioner, comitted the offense charged in this case. Hence the struck question was collateral and had no direct bearing on the issue at bar. Compare *United States* v. *Stochr*, 196 F. 2d 276 (C. A. 3), certiorari denied, 344 U. S. 826.[5]

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[4] There, the defendant was charged with stealing cattle, owned by the complaining witness but mortgaged. He claimed the owner sold the mortgaged cattle to him which would have been a crime on the owner's part. He sought to ask the complaining witness concerning other alleged sales of the mortgaged cattle. Since the answer might have substantiated the defense by showing a general course of illegal conduct, and hence the witness' motivation to cover up this conduct by bringing the complaint, the questions were held proper. *Pullman Company* v. *Hall*, 55 F. 2d 139 (C. A. 4), cited by petitioner (Pet. 11), was a civil case where defendant sought to question plaintiff concerning her alleged false swearing on a petition in forma pauperis, which the Court described at p. 141 as "matter connected with the very case on trial." *District of Columbia* v. *Chessin*, 61 F. 2d 523 (C. A. D. C.), another civil case, merely held that testimony may be offered by one party to contradict testimony given by another party. *Pittman* v. *United States*, 42 F. 2d 793 (C. A. 8), found erroneous a charge to the jury that it could not consider the admission by a Government agent that he used a false name to obtain evidence.

[5] In *Stochr*, the defendant, in an income tax evasion case, was not permitted to ask his former office manager, who testified that he had prepared false profit and loss statements for de-

4. When petitioner took the stand on his own behalf, the United States Attorney asked if on a specified date he had been convicted of distilling and received a three-year sentence. Petitioner objected and asked that the jury be instructed to disregard the question. The objection was sustained and the requested instruction given (R. 225–226). Petitioner also asked for a mistrial, but this was denied. On re-cross, the United States Attorney said: "On April 28, 1941 were you convicted of"—at this point, the judge cut him off. On petitioner's request that the jury be instructed to disregard the question, the judge said that he did not think he had allowed the United States Attorney to go far enough to justify an instruction (R. 227).

The court below held that, since evidence of a prior conviction for distilling would have been admissible for impeachment purposes, "[t]he appellant has received a better break than that to which he was entitled" (Pet. App. 21–23). The ruling of the court below was correct. A witness may be impeached in a federal court by showing prior conviction of a felony. Whether Alabama would have permitted impeachment by the showing of the same conviction is immaterial. Federal courts are not bound by state law in determining the rules of evidence, *United States* v. *Reid*, 12 How.

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fendant at defendant's direction, whether he had prepared such false statements for his former employer without the knowledge of that employer. The court held that whether he had done so or where he had learned to prepare such false statements was immaterial in regard to the question of whether he had prepared such false statements for defendant at defendant's direction.

361, or the competence of witnesses, *Wolfle* v. *United States,* 291 U. S. 7. In this case, the questions were not answered and the jury were instructed to disregard the one question which conveyed any information. It is presumed that a jury will follow instructions. *Delli Paoli* v. *United States,* 352 U. S. 232, 242. In the circumstances here, certainly the judge did not abuse his discretion in refusing to grant a mistrial. *Stahl* v. *United States,* 144 F. 2d 909 (C. A. 8).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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